No. 95-992

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
*Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Appellees.*

On Appeal from the United States District Court
for the District of Columbia

## BRIEF OF APPELLEES-INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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## QUESTION PRESENTED

Whether the three-judge district court correctly concluded that there is substantial evidence from which Congress could reasonably infer that Section 5 of the 1992 Cable Act furthers the government's substantial interests in assuring access to noncommercial educational television stations and does not burden substantially more speech than necessary to further those interests.

## RULE 29.6 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.6, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Appellees-intervenors, the Association of America's Public Television Stations ("APTS"), Public Broadcasting Service ("PBS"), and Corporation for Public Broadcasting ("CPB") (collectively "the public broadcasters"), submit this brief in support of the constitutionality of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act" or "the Act").[1/] In Section 5, Congress enacted

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[1/] The Association of America's Public Television Stations ("APTS") and Public Broadcasting Service ("PBS") are non-profit membership organizations, whose members are the licensees of virtually all of the nation's public television stations. APTS serves as the national representative of these

(continued...)

"must-carry" requirements with respect to noncommercial educational television stations. Carriage of public television stations on cable systems pursuant to Section 5 serves at least the same substantial governmental interests that support carriage of commercial stations under Section 4 of the Act, and should be upheld for the same reasons that support Section 4. In addition, Congress recognized that cable carriage of public television stations would also advance broader governmental interests, including the long-standing congressional goal of providing all Americans with an alternative to commercial television. Thus, while the public broadcasters fully endorse the constitutionality of Section 4 and adopt the arguments and evidence presented in the briefs submitted by the government and the commercial broadcasters (NAB/ALTV), the public broadcasters focus in this submission on the arguments and evidence that specifically support Congress' decision to enact Section 5.

## STATEMENT

A. Section 5 of the 1992 Cable Act requires cable operators to carry the signals of all "qualified local noncommercial educational television stations" that request carriage. 1992 Cable Act § 5(b)(1).[2/] The statute limits the total number of requesting

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[1/](...continued)
stations, presenting their views and participating in proceedings before Congress and federal administrative agencies. PBS provides national program distribution and other program-related services to the nation's public television stations. The Corporation for Public Broadcasting ("CPB") is the private, non-profit corporation authorized by the Public Broadcasting Act of 1967 and financed primarily by federal appropriations to facilitate and promote a nationwide system of public broadcasting.

[2/] A "qualified noncommercial educational television station" is (1) a station licensed by the FCC as a noncommercial educational television broadcast station, owned by a public agency or nonprofit entity, and eligible to receive a community service grant from CPB; or (2) a station that is owned and operated by a municipality and that transmits predominantly (continued...)

stations that must be carried depending on the channel capacity of the cable system in question. *Id.* § 5(b)(1)-(3). Several provisions clarify that cable operators need not carry signals that substantially duplicate those of another station carried by that system. *Id.* § 5(b)(3)(C), (e). Section 5 also requires cable operators to carry the signals of qualified noncommercial educational television stations whose signals the cable system carried as of March 29, 1990. *Id.* § 5(c).

In addition, Section 5 creates certain channel positioning rights. Each qualified local noncommercial educational television station having a right to carriage under Section 5 must be carried, at its election, on its current over-the-air channel or its channel position as of July 19, 1985, or on another channel number that is mutually agreed upon by the station and the cable operator. *Id.* § 5(g)(5).

In enacting Section 5, Congress found that "[t]here is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations" and that the "distribution of unique noncommercial, educational programming services advances that interest." *Id.* § 2(a)(7). Congress further concluded that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services." *Id.* § 2(a)(8)(D).

B. At the initial stage of this case, the three-judge court held that the must-carry provisions of the 1992 Cable Act are consistent with the First Amendment and granted summary judgment for appellees. On direct appeal, this Court vacated and remanded for further proceedings. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994) (*Turner I*).

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[2/](...continued)
noncommercial programs for educational purposes. *Id.* § 5(*l*)(1). A station is deemed "local" if the principal headend of the cable system is within 50 miles of the reference point of the station's principal community of license or within the station's Grade B contour. *Id.* § 5(*l*)(2).

This Court held in *Turner I* that the must-carry provisions of the 1992 Cable Act are content-neutral and that the appropriate standard by which to evaluate their constitutionality is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. 114 S. Ct. at 2469 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968)). Under *O'Brien* and *Ward*, a content-neutral regulation of speech must be sustained if it furthers a substantial government interest unrelated to the suppression of free expression and is narrowly tailored to further that interest. *O'Brien*, 391 U.S. at 377; *Ward*, 491 U.S. at 799.

Applying this standard, the Court identified several substantial, content-neutral governmental interests underlying Congress' enactment of must-carry provisions. *Turner I*, 114 S. Ct. at 2469. It remanded, however, for a determination of whether Congress had drawn "reasonable inferences" based on "substantial evidence" that the must-carry rules would alleviate "past harms" or "anticipated harms" and would "in fact advance [the important governmental] interests" supporting the legislation. *Turner I*, 114 S. Ct. at 2471, 2470 (opinion of Kennedy, J.). The Court invited an "elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence." *Id.* at 2472.

The Court also sought a clearer determination of whether the must-carry regulations "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 2470 (quoting *Ward*, 491 U.S. at 799). Specifically, the three-judge court was instructed to make findings concerning the "actual effects of must-carry on the speech of cable operators and cable programmers" and "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interest." *Id.* at 2472 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

In remanding for further findings, the Court expressly recognized that "Congress' predictive judgments are entitled to

substantial deference" from the courts. *Turner I*, 114 S.Ct. at 2471 (opinion of Kennedy, J.); *see also id.* at 2473 (opinion of Stevens, J.). The Court noted that the remand "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the court's] own." *Id.* at 2471 (opinion of Kennedy, J.).

C. Following the remand, the parties conducted extensive discovery and submitted cross-motions for summary judgment. In connection with their motions, appellees jointly submitted over 30 volumes of material from the congressional record, detailing the wealth of evidence before Congress supporting the must-carry provisions. Appellees also jointly submitted extensive additional evidence, including declarations of 25 fact witnesses and 10 expert witnesses, as well as more than 20 volumes of documents, supporting enactment of the must-carry provisions.

In addition to relying on evidence submitted jointly with the government and the commercial broadcasters, the public broadcasters submitted evidence specific to Section 5. The Public Broadcasters' Supplemental Statement of Evidence Before Congress provided over 60 pages of excerpts from the congressional record (including certain FCC materials) relating to Section 5. The public broadcasters also supplemented the evidence before Congress with declarations of the president of APTS, 12 public television station managers, and three expert witnesses, who explained the particular harm public television stations had suffered (and were likely to suffer in the future in the absence of must-carry requirements) as a result of adverse cable carriage actions.

The three-judge court granted summary judgment for appellees. Judge Sporkin's opinion summarized both evidence that was before Congress and additional evidence the parties had developed on remand. J.S. App. 8a-27a. He concluded that there is substantial evidence in the congressional record from which Congress could draw reasonable inferences that the must-carry rules are necessary to protect the viability of broadcast television and do not burden substantially more speech than necessary. *Id.* at 6a-7a. Judge Sporkin also concluded that substantial additional evidence confirms

Congress' findings. *Id.* at 7a.

Judge Jackson wrote a concurring opinion in which he noted that the evidence submitted by the parties revealed certain factual disputes that ordinarily would be resolved through a trial. *Id.* at 37a. However, in the interest of achieving a majority, he joined Judge Sporkin's opinion, concluding that, "taken at face value, the evidence before Congress in 1992 of an impending demise of local broadcasting was at least 'substantial' enough to warrant its prediction . . . in the absence of must-carry." *Id.* at 33a. He was also "prepared to accept as minimal the burden must-carry imposes on cable." *Id.*

Judge Williams dissented. In his view, summary judgment should have been granted in favor of appellants. Judge Williams acknowledged that some arguments in favor of must-carry regulation might be supported by evidence in the record. *Id.* at 79a-81a, 87a-88a, 89a. For example, he determined that Congress could reasonably conclude that vertical integration of cable operators and programmers created a competitive problem affecting both commercial and public broadcasters. *Id.* at 79a-81a. Judge Williams concluded, however, that both Section 4 and Section 5 fail to meet the "narrow tailoring" test and therefore violate the First Amendment. *Id.* at 90a-110a.

## SUMMARY OF ARGUMENT

I. Appellants' analysis is fundamentally flawed in several important respects. First, they err in seeking a *de novo* assessment of must carry. This Court in *Turner I* remanded for a determination of whether substantial evidence supported Congress' enactment of must-carry requirements. However, as they did in the district court, appellants essentially ignore a massive amount of evidence in support of must-carry legislation that was before Congress and instead attempt to reargue the wisdom of the legislation based on data they submitted on remand. This effort to second guess Congress' factfinding, as well as its predictive judgments, is contrary to this Court's mandate in *Turner I*. Moreover, the broad

reassessment of legislative judgments that appellants invite would set a dangerous precedent for the future. The starting point must instead be whether the evidence before Congress was sufficient to support its decision.

Appellants also err in attempting to reframe the inquiry regarding the effect of adverse carriage actions. This Court in its remand did not require a showing that the entire broadcast industry was in jeopardy without must carry. Congress sought to preserve a full range of public television stations, not just the leading station in an area. Thus, it is enough to sustain Section 5 that significant numbers of public television stations would be at serious risk of injury without must carry. Moreover, in the case of public television, injury to significant numbers of stations will result in injury to the entire public television system.

II. On remand, the public broadcasters submitted extensive evidence of the material before Congress that supported its decision to enact Section 5, as well as additional evidence that supplemented the congressional record. That evidence demonstrates that the first prong of the *Ward/O'Brien* standard — whether the statute furthers substantial government interests — has been satisfied.

The evidence demonstrates conclusively that Section 5 serves the government interests identified by this Court in *Turner I*. Substantial evidence before Congress indicated that cable operators were likely to drop or shift public television stations in the absence of must carry because these stations do not satisfy the cable operators' commercial criteria. The evidence before Congress also showed that significant numbers of public television stations already had been dropped or shifted and that most of these actions were of long term duration. Moreover, cable operators were likely to replace public television stations with cable-only programming. The additional evidence submitted on remand confirmed that cable operators have economic incentives to cut off viewer access to public television stations and indicated that the evidence before Congress in fact underestimated the volume of adverse carriage actions in the few years in which must-carry rules were not in

effect.

The evidence before Congress also showed, and the additional evidence confirmed, that public television stations suffer significant financial injury as a result of adverse cable carriage actions. A station that loses access to significant numbers of viewers loses substantial amounts of viewer contributions. Due to the interdependent nature of the financing arrangements for public television programming, financial harm to individual stations translates to injury to the public television system as a whole. Must-carry requirements thus help to preserve the economic health of public television.

Must-carry requirements also advance Congress' longstanding goal of ensuring widespread access to public television. Drops and shifts cut off viewer access to unique sources of programming, including instructional and other programming directed to underserved audiences. Requiring carriage of public television stations serves the substantial government interest in ensuring widespread dissemination of information from a variety of sources.

III. Section 5 also satisfies the second prong of the *Ward/O'Brien* standard. It constitutes a sensible, narrowly tailored solution to the problem Congress identified. Representatives of the cable industry and public television jointly developed and recommended a legislative proposal for must carry for public television. Except for the channel repositioning provisions, which were added later, the provisions of Section 5 are essentially the same as those agreed to by the cable industry. Several features of Section 5 limit the burden imposed on cable operators. Moreover, there was evidence before Congress that must carry for public television would impose only a minimal burden on cable, a prediction that was confirmed by the additional evidence submitted on remand.

Under *O'Brien* intermediate scrutiny, Congress is not required to choose a "less restrictive alternative" if that alternative would not protect the government's interests as effectively as the solution

chosen by Congress. None of the various alternatives proposed by appellants would serve the government's interests as effectively as Section 5.

## ARGUMENT

This Court in *Turner I* identified several governmental interests underlying the must-carry statute that are both substantial and non-content-based: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." 114 S. Ct. at 2469. The Court remanded for a determination of whether, under the *Ward/O'Brien* intermediate scrutiny standard, (a) there was substantial evidence from which Congress could reasonably infer that must-carry requirements further these governmental interests and (b) the "narrow tailoring" prong of that standard had been satisfied. *Id.* at 2471-72. The Court stressed that "courts must accord substantial deference to the predictive judgments of Congress" and that Congress is in a better position to gather and evaluate large amounts of data relating to a complex and dynamic issue such as must carry. *Id.* at 2471. On remand, appellees introduced over 30 volumes of evidence from the congressional record and supplemented that record with some 50 volumes of additional evidence supporting the must-carry provisions.

In their briefs to this Court, appellants essentially disregard the Court's remand instructions. Instead of addressing the evidence before Congress, they urge a *de novo* determination regarding the wisdom of must carry; in effect, they ask the Court "to replace Congress' factual predictions" with its own, contrary to the guidance provided in *Turner I* (*id.* at 2471). Furthermore, appellants attempt unilaterally to amend the *Turner I* Court's inquiry regarding the effect of adverse cable actions on broadcasters. Part I below explains why appellants' approach is fundamentally flawed.

As shown in Part II below, substantial evidence supports

Congress' conclusion that there were significant problems with cable carriage of public television stations and that must-carry requirements for public television serve the governmental interests identified in *Turner I*. In addition, as shown in Part III below, Section 5 — a provision jointly developed with, and endorsed by, the cable industry — is a sensible, narrowly tailored solution to the problems Congress identified. Thus, both prongs of the *Ward/O'Brien* standard are satisfied.

Because no material dispute of fact was raised by the evidence, the district court properly granted summary judgment regarding Section 5.[3/] That judgment should be affirmed.

## I. APPELLANTS' ANALYTICAL FRAMEWORK IS FUNDAMENTALLY FLAWED.

Many of the arguments in appellants' briefs are specifically directed to commercial stations and have little or nothing to do with public television. For example, appellants argue that the existence of the retransmission consent provisions (1992 Cable Act § 6) indicates that the broadcast industry must be financially healthy and in no need of must-carry legislation. *See, e.g.*, Time Warner Br., pp. 17-18. However, Congress did not provide for retransmission consent for public television stations; thus, the argument has no application to Section 5. Appellants' arguments regarding the

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[3/] The issue on remand was whether "substantial evidence" supports Congress' enactment of must carry. "Substantial evidence" is not uncontroverted evidence; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Judge Sporkin properly noted that, under these standards, disputes among experts do not preclude a grant of summary judgment and that, so "long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment." J.S. App. 6a. This is clearly so for Section 5. There is no dispute concerning what evidence was before Congress and the FCC. In addition, on issues material to Section 5, appellants' evidence tended to confirm the primary factual points on which the public broadcasters rely.

financial health of many commercial network affiliates, their attractiveness to investors, and the advertising revenues earned by commercial stations are similarly irrelevant to public television.

Nevertheless, appellants sweep Section 5 within their overall attack on must carry. We therefore address at the outset two fundamental flaws in their analysis.

### A. Appellants Err In Urging De Novo Assessment Of The Must-Carry Provisions.

This Court in *Turner I* remanded for a determination of whether there was "substantial evidence" from which Congress could "reasonably infer" that must-carry requirements further the government interests identified by the Court. *Turner I*, 114 S. Ct. at 2471. Appellants disregard this mandate.

The proceedings on remand revealed that Congress had before it a massive amount of evidence indicating the existence of a significant problem involving cable carriage of local broadcast stations and the need for must-carry requirements. Both Congress and the FCC studied the issue at great length. Congress held numerous hearings and developed an extensive record on the need for the legislation. That record filled over 30 volumes submitted to the three-judge court.

Appellants' opening briefs, however, give no indication at all that Congress had this massive record before it. While some appellants address bits and pieces of this evidence, none reviews the full record before Congress, or even any significant percentage of it. Instead of examining that evidence to determine whether Congress' inferences were reasonable, appellants focus on data they introduced on remand. Rather than acknowledging that deference must be accorded to Congress' gathering and assessment of information (*see Turner I*, 114 S. Ct. at 2471), appellants seek a *de novo* determination about the wisdom of must-carry legislation based solely on newly developed data that Congress could reasonably have found unpersuasive had they been timely presented.

When it decided *Turner I*, the Court clearly was not inviting this sort of broad reassessment of legislative judgments. It cautioned directly that courts are not to "reweigh the evidence *de novo*, or to replace Congress' factual predictions" with their own. *Id.* at 2471. In the past, the Court has rebuked lower courts that have undertaken the sort of *post hoc* evaluation appellants engage in as "quite lacking in the deference which ought to be shown . . . in evaluating the constitutionality of an Act of Congress." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 328 (1985). *See also id.* at 331 n.12 (great deference due to Congress' findings on "essentially factual issues").[4/] Especially in the context of First Amendment claims involving the broadcast media, the Court has recognized that when a federal court "face[s] a complex problem with many hard questions and few easy answers [it does] well to pay careful attention to how the other branches of Government have addressed the same problem." *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 103 (1973). The remand instructions in *Turner I* must be interpreted in light of these precedents.[5/]

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[4/] *Accord Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (court erred in undertaking independent evaluation of testimony before Congress rather than adopting "appropriately deferential examination of Congress' evaluation of that evidence" in assessing constitutionality of statute); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 674 (1972) (it was "beyond the competence of the Court of Appeals itself to assess the relative risks and benefits" of FCC policy, so long as that policy was based upon findings supported by evidence).

[5/] The instructions should also be interpreted in light of the circumstances present in the cases cited in the Court's discussion of the standard of review to be applied on remand (114 S. Ct. at 2471). In those cases, the Court declined to defer to the legislative determination at issue because there was *no* support in the legislative record (*Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989)), or because the determination was directly contrary to Supreme Court precedent (*Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844-45 (1978)). Neither of those extreme scenarios is presented here.

Moreover, the implications of appellants' approach for future cases are deeply troubling. The concept of judicial deference to Congress' judgments would lose all meaning if parties were free to participate in the legislative debate and then pursue a judicial challenge based on evidence and arguments that were not before Congress. Under such a regime, any party with substantial resources could (like the cable industry here) create an extensive after-the-fact legislative record in a judicial proceeding and then urge the court to engage in broad second guessing of legislative judgments.

The starting point in the analysis must be the evidence before Congress and whether Congress acted reasonably based on that evidence. It is not whether, putting that evidence aside, there are other conceivable ways in which Congress *could* have analyzed the problem. Because appellants fail to address the basic question — whether the record before Congress supports its decision to enact must carry — their analysis is necessarily flawed.

### B. Appellants Improperly Reframe The Inquiry Regarding The Effect Of Adverse Cable Actions On Broadcasters.

Each appellant charges that appellees have attempted to redefine the government interest at stake by focusing on the effect of adverse cable actions on individual broadcast stations.[6/] Appellants assert that this Court held in *Turner I* that Congress based its decision to enact must carry on a finding that, without it, the entire television industry would immediately be in jeopardy. They then purport to show that many television stations are successful, and from this they conclude that there is no basis for must carry.[7/]

In fact, it is appellants that have redefined the inquiry in a manner that dictates the result they seek, in the process distorting

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[6/] *See, e.g.*, Turner Br., pp. 29-30; Time Warner Br., pp. 26-31; NCTA Br., p. 32; Discovery Br., pp. 8-11.

[7/] *See, e.g.*, NCTA Br., pp. 12-26; Time Warner Br., pp. 12-31.

the legislative history and the Court's statements in *Turner I*. In essence, appellants urge an implausible reading of Congress' and this Court's words, one that sets up an impossible standard for remand and that cannot be reconciled with Congress' intent.

One of the interests Congress articulated in connection with must carry was preservation of the "economic viability of free local broadcast television." 1992 Cable Act § 2(a)(16).[8/] The words Congress used in describing this interest are general ones; they do not bear the rigid interpretation appellants attempt to force on them. An interest in the "economic viability of free local broadcast television" — and the Court's references to this interest — fairly include a concern with the health of individual stations that make up the system of local broadcasting. Contrary to appellants' contention, Congress' broad description of this interest does not require a finding that every broadcast station, or even the majority of stations, needed must-carry legislation in order to survive.[9/]

The interest in the economic viability of free local broadcast television must be understood in light of what Congress was trying to accomplish. Congress was concerned that, by virtue of their bottleneck monopoly, cable operators were in a position to destroy the viability of a substantial portion of the industry, depriving viewers of the benefits of broadcast television, in all of its varied forms. *See, e.g.*, 1992 Cable Act § 2(a)(2)-(5). Moreover, Congress was concerned with preserving the system of broadcast signal allocation administered by the FCC in order to provide "a fair, efficient, and equitable distribution of broadcast services" (*id.*

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[8/] Congress articulated other interests that are specific to must carry for public television. *See id.* § 2(a)(7), (8).

[9/] The structure of the 1992 Cable Act itself indicates that Congress did not regard the entire television industry as a monolithic entity. Its enactment of retransmission consent provisions for commercial broadcast stations at the same time as must carry reflects an understanding that some commercial stations would be highly attractive to cable operators and therefore would not need to invoke must-carry protection.

§ 2(a)(9)) and ensuring that non-cable households would continue to receive broadcast programming over the air without artificial restraints on access imposed by cable (*id.* § 2(a)(12)).[10/] Congress addressed these concerns by making must-carry protection broadly available, so that the full range of broadcast stations — not just those popular with cable companies — would continue to be available to both cable and non-cable households.

The enactment of Section 5 itself is evidence that Congress did not treat the television industry as a monolith. Obviously, Congress regarded public television stations as a segment of the industry that is particularly vulnerable and that should be preserved in an economically viable form, regardless of the health of commercial stations. Moreover, Congress did not simply provide for carriage of one public television station in each community. A cable system with more than 12 channels may be required to carry two or three public television stations, ensuring carriage for not only the mainstream station in an area, but also (for example) a university station that offers telecourses or a station that focuses on minority affairs programming or instruction for school-age children.[11/] Thus, Congress sought to keep public broadcasting not just alive, but in a position to offer a variety of programs to a range of audiences in communities that support more than one public television station. While appellants may believe that access to a single "mainstream" public television station is sufficient for viewers in a community, and that cable operators should otherwise be free to eliminate their subscribers' access to public television, Congress had a different view. *See* 1992 Cable Act § 2(a)(8) (stating government's interest in making "all nonduplicative local public

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[10/] Time Warner acknowledges that Congress was concerned with preserving the system of allocation for broadcast signals. Br., p. 28. This goal necessarily encompasses preservation of viewer access to the whole range of stations licensed by the FCC, not just the most popular.

[11/] In a few cases a cable system with more than 36 channels could be required to carry more than three public television stations, but this would be quite rare. *See* page 43, *infra*.

television services" available).

Appellants' effort to draw a distinction between the health of the broadcast industry and the health of individual stations that suffer adverse carriage actions is particularly inappropriate in the case of public television. Contrary to appellants' claims (*see, e.g.*, Time Warner Br., p. 26), the public television stations that suffered adverse carriage actions are no small group of "marginal" stations. The great majority of public television stations experienced some adverse cable action in the absence of must carry.[12/] Moreover, the problems were not confined to "third-tier public stations in heavily-saturated markets" (Discovery Br., p. 3). The affected group included all types of public television stations, and the incidents occurred across the country, in both large and small markets.[13/]

Moreover, Congress was necessarily concerned with the viability of the individual stations that make up the public television system. As the evidence shows (*see* pages 31, 32, *infra*), public television programming is financed through an interdependent scheme that involves contributions from all public television stations. As a result, harm to the weaker stations ultimately affects

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[12/] Data submitted on remand show that 314 public television stations (over 85 percent of the total figure of 368 stations cited by appellants) had experienced cable drops by late 1992. *See* page 26, *infra*. This evidence flatly contradicts Discovery's assertion (Br., pp. 12-13) that only the least watched 15 percent of public television stations experienced carriage problems. (Moreover, Discovery's assertion is not supported by the deposition testimony it cites.)

[13/] Even the limited group of examples provided in Part II below indicates that adverse carriage actions in the 1985-1992 period affected state networks, stations run by university licensees, stations owned by community licensees, large and small stations, primary and secondary stations. The affected stations were located throughout the country, not just in large markets with many television stations. Public television stations experienced drops or shifts in many smaller communities, such as Luling, Louisiana, Battle Creek, Michigan, and many others. *See* pages 30-31, 38-39, *infra*.

the health of the entire public television system. Appellants' claim that Congress' concern with economic viability does not encompass harm to groups of stations or to significant numbers of individual stations is inconsistent with the record and must be rejected.[14/]

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT SECTION 5 SERVES SIGNIFICANT GOVERNMENT INTERESTS.

There is ample evidence in the record — both the evidence before Congress and additional evidence introduced on remand — showing that must-carry legislation for public television serves significant government interests.[15/] Thus, the first requirement of the *Ward/O'Brien* standard is clearly satisfied.

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[14/] Appellants insist that it is "self-evident" that must carry helps those stations that request carriage and that the Court surely would not have remanded for such a showing. *E.g.*, Turner Br., pp. 30-31. The argument is at odds with common sense. The fact that it is "self-evident" that must-carry legislation helps to preserve the viability of stations that would suffer adverse cable actions is surely an argument in support of Congress' judgment, not against it. *See United States v. Midwest Video*, 406 U.S. at 664 ("[T]he avoidance of adverse effects is itself the furtherance of statutory policies.") (plurality opinion).

Of course, it is just as "self-evident" that the entire broadcast industry was not on the brink of extinction in 1992. The Court certainly would not have taken the trouble to remand if it required a showing that no station could survive without must carry.

[15/] In the court below, appellees submitted more than 80 volumes containing the evidence supporting must-carry provisions. Due to the page limitation, only a fraction of this evidence can be summarized in the briefs. Nevertheless, the discussion below makes clear that there is more than enough evidence to support Congress' enactment of Section 5.

### A. There Is Substantial Evidence That, Without Must Carry, Cable Systems Were Likely To Drop Or Shift Public Television Stations And That The Problem Was Likely To Worsen In The Future.

*1. The Evidence Before Congress.* In the period prior to passage of Section 5, Congress had before it a large amount of evidence demonstrating that, absent must carry, "significant numbers" of public television stations were likely to be denied carriage on cable systems (*Turner I*, 114 S. Ct. at 2471).[16/] The evidence indicated that cable systems have strong incentives to drop public television stations due to these stations' failure to offer attractive commercial opportunities and programming designed to appeal to a mass audience. Furthermore, there was substantial evidence that cable operators had acted on these incentives by dropping or repositioning significant numbers of public television stations and that the situation was likely to worsen.

In its report on the 1992 Cable Act, the House Committee described the "economic logic" underlying its predictive judgment that cable operators were likely to deny carriage to many local public television stations:

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[16/] In addition to evidence submitted directly to Congress, evidence was presented to the FCC in connection with its consideration of must carry in the 1985-1992 period. This evidence is properly regarded as part of the congressional record. Congress was aware of the proceedings conducted by the FCC and cited evidence from those proceedings in its reports on the 1992 Cable Act. *See, e.g.*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 52 (1992) ("1992 House Report"), CR VOL. I.A., EXH. 4, CR 00431.

Most congressional record materials cited herein were reprinted in a 33-volume appendix submitted jointly by appellees in the district court. The volume and page references from that appendix are included in the citations for the Court's convenience. In addition, the public broadcasters compiled the Public Broadcaster Defendant-Intervenors' Supplemental Statement of Evidence Before Congress, a summary of congressional record material relating to Section 5. This summary is reprinted in the Joint Appendix for the Court's convenience (J.A. 1705-60).

> Because cable operators are for-profit enterprises, they necessarily seek to provide customers with the package of programming and services that will maximize the operators' profits. As commercial enterprises, cable operators ordinarily lack strong incentive to carry programming that does not attract sufficient dollars or audiences. Traditionally, public television has provided precisely the type of programming commercial broadcasters and cable operators find economically unattractive. For this reason, the Committee believes that, without "must carry" provisions, public television service increasingly will become unavailable to cable subscribers.[17/]

Several witnesses had previously presented evidence that the commercial marketplace is unlikely to attribute significant value to the noncommercial mission of public television. In testimony before the Senate Subcommittee on Communications, the President of APTS, David Brugger, explained why public television services are unlikely to meet a cable operator's financial criteria for carriage. Citing a model produced by United Cable Corporation and a consulting firm for evaluating the optimal channel use for cable systems, he noted that the model "systematically estimates a programming service's revenue contribution to the cable system" and that "[p]ublic television services are unlikely to rate high on implicit or explicit criteria in this sort of decisionmaking."[18/]

At a subsequent hearing, George Miles, a station manager, testified that

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[17/] 1992 House Report at 70, CR VOL. I.A, EXH. 4, CR 00449.

[18/] *Must Carry: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 100 (1989) ("1989 Senate Hearings"), CR VOL. I.F, EXH. 12, CR 04110. *See also id.* at 107, CR VOL. I.F, EXH. 12, CR 04117; Comments of APTS in FCC MM Docket 89-600 (March 1, 1990) at 18-19, CR VOL. I.T, EXH. 103, CR 12200-01.

> public TV is at a natural disadvantage compared with most other program services. Our stations are owned by universities, school systems and nonprofit community groups. We cannot offer an equity position to major cable operators, nor can we offer advertising time to cable systems as do many program services.[19/]

Then-Senator Gore summarized the predictive evidence regarding the incentives of cable operators with respect to public television stations:

> [C]able systems are for-profit enterprises and naturally seek to carry programming which maximizes dollars and audience. Public television, in fulfilling its mandate to serve those audiences not served by commercial enterprises, carries much programming that cable systems find economically unattractive.[20/]

The evidence concerning the incentives of cable operators was confirmed by the experience of public television stations. Several studies presented to Congress showed that millions of viewers had lost access to public television stations because of the actions of cable operators. Among these was the survey the FCC undertook in 1988, in the early part of the period when must-carry rules were

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[19/] *Cable Television Regulation: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong., 2d Sess., pt. 2, at 89 (1990) ("1990 House Hearings"), CR VOL. I.I, EXH. 16, CR 06256; *see also* Comments of APTS and PBS in FCC MM Docket 88-138 (July 8, 1988), at 9, CR VOL. I.Z, EXH. 140, CR 15293 ("Public television stations cannot provide local ad spots for use by cable operators, cannot afford to pay for carriage, and are not, by virtue of their Congressional mandate, designed to please mass audiences as a primary goal."); Comments of State Public Broadcasting Networks in FCC MM Docket 85-349 (Jan. 29, 1986), at 17-19, CR VOL. I.CC, EXH. 166, CR 16245-47.

[20/] 138 Cong. Rec. S595 (Jan. 29, 1992), CR VOL. I.EE, EXH. 198, CR 17136.

not in effect.[21/] The FCC found that 80 of the 237 public television stations reporting had been dropped by or denied carriage on at least one cable system, with total incidents numbering 345. Of the 4,303 cable companies responding, 347 operators reported that they had dropped or denied carriage to a total of 153 public television stations, with total incidents numbering 463.[22/]

The plurality noted in *Turner I* that the FCC's report does not indicate "the time frame within which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage." 114 S. Ct. at 2471. However, other studies presented to Congress and the FCC fill these gaps. One set of studies indicated that there had been a growing number of incidents of drops in the year or so prior to the FCC survey. In the summer of 1987, APTS investigated all reports of dropped or

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[21/] Cable System Broadcast Signal Carriage Survey Report, in FCC MM Docket 90-4 (Sept. 1, 1988), CR VOL. I.P, EXH. 52, CR 10645. The survey elicited responses from 50.6% of the cable systems and 67.3% of the television stations contacted. Respondents were asked to identify noncarriage and channel shifts that would have been covered by the FCC's rules in effect prior to July 19, 1985. *See id.* at 4 & n.2, CR VOL. I.P, EXH. 52, CR 10648.

[22/] *Id.* at 9, 10, CR VOL. I.P, EXH. 52, CR 10653, 10654. The FCC also reported that 88 of the 237 responding public television stations had been repositioned, with 417 total incidents, and that 432 of the cable companies responding reported repositioning 182 public television stations, with a total of 541 incidents. *Id.* at 18, 19, CR VOL. I.P, EXH. 52, CR 10662, 10663.

Appellant NCTA criticized the FCC study, but its own survey, also conducted in 1988, showed that 205 cable systems (representing almost 2.5 million subscribers) were not carrying all broadcast stations qualified for carriage under the FCC's 1986 must-carry rules, and that 305 cable systems had repositioned at least one such station since June 1987. In each case, about 20 percent of the stations affected were public television stations. NCTA Broadcast Station Carriage Survey, in FCC MM Docket 88-138 (Sept. 14, 1988), at 1338-39, 1351, CR VOL. I.AA, EXH. 146, CR 15424-25, CR 15437.

repositioned stations that it had received from its members. It verified a total of 74 public television stations dropped since 1985.[23/] One year later, in the spring of 1988, APTS reported to Congress 94 instances in which public television stations had been dropped from cable systems and carriage had not been restored.[24/]

Congressional hearings on must carry began in earnest in the fall of 1989, and this appears to have had the effect of slowing the number of adverse cable actions, as cable operators consciously maintained "good behavior" (*see* pages 23-24, 34 n.45, *infra*). However, even the threat of legislation did not stem the tide completely. In the fall of 1991, at least 16 stations reported to APTS that they had been dropped in the preceding two years by cable systems with headends within 50 miles of the stations' main transmitters or within the stations' Grade B contours.[25/]

The evidence presented by APTS revealed that most of the

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[23/] APTS and PBS Comments in MM 88-138, at 13, CR VOL. I.Z, EXH. 140, CR 15297. The reported incidents were verified by calls to the cable system and were reviewed to exclude those stations that were "distant" signals and therefore did not qualify for carriage under the pre-1985 must-carry regulations. *See id.* at 12, CR VOL. I.Z, EXH. 140, CR 15296.

Appellant Discovery's suggestion that the APTS data are inaccurate rests on an erroneous characterization of the record. The comment of Dr. Bernadette McGuire that Discovery quotes (Br., p. 12 n.2) refers to data that had been collected prior to her arrival at APTS in 1987. There is no evidence that these early data were presented to Congress. As Dr. McGuire testified, she and her staff carefully verified data on cable carriage beginning in 1987. McGuire Dep., pp. 88-90 (J.A. 361). *See also* Brugger Dec. ¶ 15 (J.A. 1183-84).

[24/] *Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 100th Cong., 2d Sess. 597 (1988) ("1988 House Hearings"), CR VOL. I.D, EXH. 9, CR 02684 (testimony of David Brugger).

[25/] Supplemental Comments of APTS in FCC MM Docket 90-4 (Sept. 25, 1991), at 14, CR VOL. I.P, EXH. 64, CR 10801.

drops and channel shifts experienced by public television stations were not temporary. For example, of the 74 verified drops of a public television signal identified in the 1987 study, only 16 (22%) were later restored. Of the 128 verified shifts of a public television signal identified in the same study, only 30 (23%) were later restored to their former channel number.[26/] The evidence also demonstrated that cable operators tended to replace dropped public television stations with cable-only programming services. The 1987 survey showed that, for 36 of the 44 verified drops for which information on replacement programming was available, the replacement was a programming service exclusive to cable.[27/] Likewise, the 1991 APTS survey indicated that the majority of the dropped stations had been replaced with cable-exclusive program services.[28/]

Moreover, the evidence strongly suggested that the numbers provided to Congress understated the magnitude of harm that could be expected in the future. In particular, the comments of cable industry leaders indicated that cable operators were exercising considerable self-restraint during this period. For example, Edward Allen, then-Chairman of appellant NCTA, on several occasions advised cable operators to refrain temporarily from dropping or shifting stations. Mr. Allen told cable operators to "'hold their fire and wait for this to calm down' because action would be 'politically dangerous.'"[29/] In urging cable operators not to act precipitously after the FCC's must-carry rules were invalidated in 1985, "Allen . . . cautioned the Washington Cable Club that '[a] wise

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[26/] APTS and PBS Comments in MM 88-138, at 13-14, 22, CR VOL. I.Z, EXH. 140, CR 15297-98, 15306.

[27/] *Id.* at 15, CR VOL. I.Z, EXH. 140, CR 15299.

[28/] Supplemental Comments of APTS in MM 90-4, at 14-15, CR VOL. I.P., EXH. 64, CR 10801-02.

[29/] Multichannel News, Sept. 23, 1985, at 6, quoted in Comments of NAB in FCC MM Docket 85-349, at 27 (Jan. 29, 1986), CR VOL. I.BB, EXH. 165, CR 16187.

man doesn't insult the alligators until he's across the river.'"[30/]

In sum, Congress had before it (1) predictive evidence that cable operators have financial incentives to drop or reposition noncommercial services and to replace them with cable-exclusive programming, (2) historical evidence that cable companies in fact had taken adverse actions against a significant number of public television stations, and (3) evidence that the available statistics probably did not capture the full extent of the likely harm. Congress reasonably inferred from this evidence that, absent must carry, cable operators were likely to drop, deny carriage to, and reposition public television stations in significant numbers.

*2. Additional Evidence Developed On Remand.* The additional evidence submitted on remand confirms that significant numbers of public television stations were in jeopardy without must carry. Appellees' economic expert, Dr. Roger Noll, confirmed that cable operators have economic incentives to drop or reposition

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[30/] Comments of Spanish International Communications Corporation, *et al.* in FCC MM Docket 85-349, at 11 (Jan. 29, 1986), CR VOL. I.AA, EXH. 154, CR 15649. *See also* Comments of Association of Independent Television Stations, Inc. in MM 85-349 at vi (Jan. 29, 1986), CR VOL. I.BB, EXH. 162, CR 15829 ("Cable industry leaders have publicly admonished cable operators to refrain temporarily from exercising the new leverage given them by the *Quincy* decision. Consequently, only the 'tip of the iceberg' of harm to broadcasters has surfaced to date."); J.S. App. 54a (quoting additional cable industry comments).

Congress also heard testimony indicating more specifically that the incidence of drops and shifts of public television stations was likely to increase in the future. For example, Henry Becton, President and General Manager of WGBH (Boston), testified that carriage of public television stations was likely to deteriorate as the cable market became more competitive. *Cable Television Regulation: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102nd Cong., 1st Sess. 835 (1991) ("1991 House Hearings"), CR VOL. I.J, EXH. 18, CR 07839; *see also id.* at 843, CR VOL. I.J, EXH. 18, CR 07847; 1989 Senate Hearings at 102, CR VOL. I.F, EXH. 12, CR 04112.

public television stations. While a cable operator may have an incentive to carry the primary public television station in a market in order to attract subscribers who want access to public television, the operator is likely to regard a secondary public television station as far less economically attractive, especially compared to cable services that are under common ownership with the operator or that offer extra revenue in exchange for carriage.[31/] Thus, although a secondary public television station provides a unique source of noncommercial programming, a cable operator is likely to regard it as expendable when an attractive revenue opportunity comes along.[32/]

Even appellants' evidence confirms Congress' judgment that cable systems have incentives to drop public television stations. Appellants' experts testified, and appellants argue on appeal, that cable operators drop those stations that have low viewership ratings. *E.g.*, Turner Br., pp. 34-35; Time Warner Br., pp. 18-20. However, viewership is not the criterion by which public television performance is measured. Congress established public television as a noncommercial service, with the mission of serving otherwise unserved or underserved audiences. The whole point of public television is to provide services that are *not* necessarily designed to appeal to a mass audience. *See* page 37, *infra*. This will be particularly true for the second and third public television stations in a

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[31/] Noll Dec. ¶ 29 (J.A. 1018-19). As non-profit entities, public television stations are not in a position to pay for carriage. Nor does a public television station offer any equity interest or opportunity to earn local advertising revenues. *See* Brugger Dec. ¶ 37 (J.A. 1188-89) & Ex. 7 (Letter from Associate Director of the Utah Network to Senator Jake Garn, "When requesting access for KULC, we are told directly that profit-generating cable channels take precedence over an educational channel."); Alpert Dec. ¶ 6 (J.A. 568-69).

[32/] Dr. Noll also explained that cable operators' incentives to drop or reposition broadcast stations have increased since 1992. *See* Noll Dec. ¶¶ 7-35 (J.A. 1001-24). The briefs filed by other appellees contain a more complete discussion of the testimony of Dr. Noll and appellees' other experts regarding cable operators' incentives.

market, which often fill special niches by focusing on areas such as instructional programming or programs tailored to minority audiences. *See* Downey Dec. ¶¶ 13-14 & Ex. B (J.A. 1066-67, 1078-79); Brugger Dec. ¶¶ 5-6 (J.A. 1182-83). Under a viewership criterion, these stations are likely to be dropped, or never carried at all.

Additional data introduced on remand demonstrate that the figures before Congress likely underestimated by a substantial amount the scope of carriage problems experienced by public television stations. Using cable carriage data compiled by Cable Data Corporation ("CDC"), an expert witness determined that the actual number of drops that had occurred as of mid-1988 was likely closer to *double* that suggested by the FCC survey. Meek Dec. ¶ 11 (J.A. 621).[33/] The CDC data show that after the FCC Survey the cumulative number of drops grew steadily. The data indicate that, as of the end of 1992, 314 public television stations were dropped from carriage by 1,616 different cable systems located within 50 miles. Feldman Dec. ¶¶ 9, 11 (J.A. 978-79). As a result, public television stations lost access to a total of more than 10 million cable subscribers. *Id.* ¶ 12 (J.A. 979-80).[34/] Again, appellants' evidence confirms the point, revealing very substantial noncarriage of public television stations. According to appellants' expert witness, in late 1992 a typical cable subscriber had access to only 78 percent of local public television stations; over one-third of such

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[33/] Data collected and maintained by CDC are taken from forms filed by cable systems with the Copyright & Licensing Division of The Library of Congress at the end of each six-month period. The CDC database is the best historical source for national cable carriage information concerning broadcast stations. Meek Dec. ¶ 29 (J.A. 625-26).

In the court below appellants questioned the accuracy of the CDC data. These arguments are without merit, as shown at pages 23-28 of the reply brief filed by the public broadcasters in the district court on June 30, 1995.

[34/] The CDC figures are conservative in that, among other things, they omit instances of noncarriage (*i.e.*, situations in which a cable system never carried a station) and channel shifts.

stations were not carried on the average cable system. Besen Dec. pp. 5, 44 & Exh. C-3 (J.A. 778, 810, 908).

The public broadcasters also submitted declarations of 12 station managers to provide examples of the drops, noncarriage and channel shifts experienced by public television stations in the absence of must carry. This evidence includes the following:

- WKYU, licensed to Western Kentucky University in Bowling Green, Kentucky, was able to gain carriage on only four local cable systems after it began operations in 1989. Anderson Dec. ¶¶ 5-6 (J.A. 523).

- KCSM, licensed to San Mateo Community College in San Mateo, California, was dropped by many cable systems in the San Francisco Bay area between 1986 and 1991. Hosley Dec. ¶¶ 9-11 (J.A. 574-75).

- WTVS in Detroit, Michigan, was dropped by the cable system in Flint, Michigan and was shifted from channel 6 to channel 56 or channel 51 on various cable systems in the Detroit suburbs. Alpert Dec. ¶¶ 5-6, 8, 12 (J.A. 568-70).[35/]

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[35/] Many other instances of drops, noncarriage and channel shifts are listed in the declarations of station managers and in the "master list" compiling drop and shift information reported to APTS, appended as Exhibit 6 to the declaration of David Brugger (J.A. 1199-1212). Because it is based on anecdotal evidence, the "master list" does not capture all of the adverse cable actions identified in the more systematic CDC data. *See* Brugger Dec. ¶ 24 (J.A. 1185).

Discovery errs in alleging (Br., p. 12) that the "master list" shows fewer drops than a 1987 study cited by Judge Sporkin. As Judge Sporkin's opinion indicates (J.S. App. 12a), the 1987 survey showed that at that point

(continued...)

Even after the reimposition of must carry at the end of 1992, public television stations had difficulty obtaining cable carriage. For example, it took "a relentless campaign" and "months of discussions and delays" before some cable systems agreed to carry KRSC, located in Claremore, Oklahoma. Smith Dec. ¶ 7 (J.A. 562-63). Cable resistance made it necessary for public television stations to file scores of complaints with the FCC in order to obtain carriage.[36/]

Evidence of this resistance strongly reinforces Congress' earlier conclusions about operators' economic incentives to drop public television stations. If cable operators so aggressively stonewall these stations while Section 5 is on the books, it is surely reasonable to infer that numerous drops and shifts would occur in the absence of must-carry protection.

### B. There Is Substantial Evidence That A Must-Carry Requirement Is Needed In Order To Preserve The Financial Health Of Public Television Stations.

This Court stated in *Turner I* that the government must demonstrate that dropped or repositioned broadcast stations "would suffer financial difficulties as a result." 114 S. Ct. at 2471-72. Because

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[35/](...continued)
public television stations had reported 74 drops; the "master list" shows 130 instances of drops reported over a longer period (Brugger Dec. ¶ 19) (J.A. 1184-85).

[36/] For example, Greater Dayton Public Television found it necessary to file 40 complaints with the FCC to enforce its rights to carriage and/or channel position. Out of these 40 complaints, Greater Dayton was found to be entitled to carriage (assuming it delivered a good quality signal) in 39 cases. Fogarty Dec. ¶ 7. As of May 1, 1995, twenty-eight public television stations had filed 175 complaints to enforce their must-carry rights. Of the 170 complaints that had been resolved at that point, the Commission granted carriage, or the complaint was dismissed because the cable company agreed to carriage, in 135 instances (or almost 80% of the cases). *See* Brugger Dec. ¶ 34 (J.A. 1188).

public television stations have noncommercial objectives, it would be wrong to focus solely on financial effects in the public television context. *See* pages 36-40, *infra*. At the same time, financial health is obviously crucial to the ability of public television stations to continue providing a unique source of noncommercial programming. There is substantial evidence from which Congress could reasonably conclude that public television stations that were dropped or repositioned were at "serious risk of financial difficulty" (114 S. Ct. at 2472).

*1. The Evidence Before Congress.* Congress and the FCC were aware that, for public television stations, one of the primary financial impacts of adverse cable actions is a decrease in the ability to attract viewer contributions. As of 1991, public television stations received approximately 21 percent of their revenue from viewer contributions, making this the largest single source of funds for public television programming.[37/] Then-Senator Gore aptly summarized the evidence regarding the potentially disastrous financial consequences of noncarriage for public television stations:

> The impact of noncarriage is particularly devastating to public television stations. The largest single source of funding for public television is from private individual contributions. When a local cable system drops a public television station, its contributions from its cable viewers are in jeopardy. Without the key financial support from its cable audience, a public television station can easily slip below the level of viability required to continue to provide service to its broadcast audience. Stations not only lose audience and contributors, they also lose paying enrollees to their college telecourses, and elementary and high school students are deprived of their instructional

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[37/] Supplemental Comments of APTS in MM 90-4 at 17, CR VOL. I.P, EXH. 64, CR 10804.

programming.[38/]

When a local public television station disappears from a cable system, it naturally loses its ability to attract contributions from those cable subscribers.[39/] In testimony before Congress, FCC Commissioner James Quello described this effect:

> The most significant problem confronting public television today is adequate funding. As the former Chairman of the Temporary Commission on Alternative Financing for Public Telecommunications, I can attest to the difficulties public stations have in securing non-government funds. The dropping of a public television station can have enormous impact on a station's revenues. . . . Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating.[40/]

The record before Congress contains reports of experiences of individual public television stations demonstrating that a drop or shift of cable channel position would eventually lead to a loss of membership and contributions, including the following:

- WKAR, East Lansing, Michigan, reported a loss of 592 contributing members in the Battle Creek area after it was dropped from the local cable system. Supplemental Comments of APTS in MM 90-4, at 18, CR VOL. I.P, EXH. 64, CR

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[38/] 138 Cong. Rec. S595 (Jan. 29, 1992), CR VOL. I.EE, EXH. 198, CR 17136.

[39/] *See Public Cable Co.*, 64 F.C.C.2d 701, 709 (1977) ("revenue sources of a local educational television broadcast station can be considered sensitive to audience size"), *aff'd*, *Colby-Bates-Bowdoin Educational Telecasting Corp. v. FCC*, 574 F.2d 639 (1st Cir. 1978).

[40/] 1988 House Hearings at 323-24, CR VOL. I.D, EXH. 9, CR 02409-10.

10805.

- KIIN, Iowa Public Television, was moved by a TCI cable system from its over-the-air channel 12 to channel 22 in four towns in Dubuque County. Thereafter, IPTV noticed that membership increases in the area of the channel shift were down 75% as compared to the rest of the state. 1989 Senate Hearings at 102, CR VOL. I.F, EXH. 12, CR 04112 (testimony of David Brugger).

The congressional record makes clear that lost revenue threatens not just individual stations, but the integrity of public television as a whole, due to the interdependent nature of public television financing. Donald Ledwig of CPB advised the House subcommittee: "Th[e] loss of carriage of individual stations exerts a cumulative drag on the ability of the stations to finance production of new and innovative programming, because public television funds many of its programs collectively through such mechanisms as the Station Program Cooperative and the Program Challenge Fund. Thus, carriage loss of each individual station harms the overall public television system."[41/]

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[41/] 1988 House Hearings at 602, CR VOL. I.D, EXH. 9, CR 02689; *see also* Comments of CPB, APTS, and PBS in MM 85-349, at 32, CR VOL. I.BB, EXH. 163, CR 16015.

The evidence before Congress also shows that financial loss can result from adverse carriage actions that are temporary, as well as those that are long term. For example, WILL-TV, licensed to the University of Illinois and the prime instructional television service for almost 4000 students in Jacksonville and South Jacksonville, Illinois, incurred significant expenses to have its signal restored after it was dropped from a Jacksonville cable system. 1991 House Hearings at 842, CR VOL. I.J, EXH. 18, CR 07846. *See also* Supplemental Comments of APTS in MM 90-4, at 16, CR VOL. I.P, EXH. 64, CR 10803 (describing resources expended to achieve restoration of Georgia Public Television to cable system in Peachtree City, Georgia).

*2. Additional Evidence Developed On Remand.* The additional evidence submitted on remand confirmed that loss of cable carriage results in financial injury to public television stations. Jonathan Abbott, PBS's Senior Vice President for Development and Corporate Relations, testified that a public television station's ability to obtain donations from individuals and to sustain contributions from members depends primarily on the station's access to viewers. When a public television station loses access to a given number of households due to adverse cable actions, it will lose a number of viewers and, hence, individual contributions from those viewers. Abbott Dec. ¶¶ 5, 9-11 (J.A. 1034-37).[42/] This is consistent with Dr. Noll's expert analysis: "Noncommercial broadcasters need revenue to pay for their programs, and they derive revenue from contributions by viewers, nonprofit institutions, and corporations. These revenues are greater if the audience reached by the station is larger." Noll Dec. ¶ 38 (J.A. 1025-26). If the loss of access is significant, the resulting loss in contributions could have a substantial adverse effect on the station's ability to operate. Abbott Dec. ¶¶ 5, 11-15 (J.A. 1034-35, 1037-38).

Peter Downey, PBS's Senior Vice President of Program Business Affairs, confirmed that significant revenue losses at even a limited number of public television stations can affect the health of the entire public television system, due to the cooperative arrangement for financing of the PBS National Program Service ("NPS"). A station that suffers a significant revenue loss as a result of an adverse carriage action may eventually have to reduce its level of participation in the NPS to cut expenses. When this occurs, the total amount in the cooperative fund that supports national public television programming is reduced, which in turn affects all stations. Downey Dec. ¶¶ 26-27, 29, 33 (J.A. 1071-72, 1074).

Public television station managers testified that adverse cable actions had resulted in tangible financial harm to their stations.

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[42/] Loss of carriage also affects the ability of public television stations to obtain corporate underwriting and foundation grants. Abbott Dec. ¶¶ 30-33 (J.A. 1045-46); Smith Dec. ¶ 9 (J.A. 563-64).

Following a drop or a shift, members who no longer receive a station's signal commonly advise the station that they will no longer contribute.[43/] While it is often difficult to quantify the financial harm from adverse cable actions, some stations have been able to do so. For example, WTVS, located in Detroit, Michigan, lost approximately $31,000 per year as a result of being dropped by the cable system in Flint, Michigan, in 1991. Alpert Dec. ¶ 13 (J.A. 570). In 1987, the cable company in Wheeling, West Virginia, shifted WNPB to a higher channel (which could not be accessed without a converter box), resulting in a 46 percent drop in membership and a 36 percent drop in revenue from the Wheeling area. Lewis Dec. ¶ 10 (J.A. 547-48). *See also, e.g.*, Meuche Dec.¶ 6 (J.A. 558-59) (loss of $13,000 per year); Dial Dec. ¶ 8 (J.A. 541-42); Malloy Dec. ¶¶ 6, 10 (J.A. 552-55).

Discovery asserts that public television stations did not suffer financial injury as a result of adverse cable actions. Br., pp. 11-14. These assertions, as well as various arguments put forward by Time Warner in the district court, rest on mischaracterizations of both the public broadcasters' contentions and the record evidence.

Discovery begins with the improbable proposition that, as of 1992, public television was "perfectly healthy and in no jeopardy from cable," citing growth in the number of public television stations and in public television revenue. Br., p. 12. However, the evidence in the record shows, among other things, that most of the "new" public television stations in the 1985-1992 period were "satellites" of existing stations or were religious or student-run stations not covered by Section 5. Coltman Dec. ¶ 10 (J.A. 2079). While Discovery asserts that public television member revenues grew faster than the inflation rate during this period, the record

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[43/] *See* Meuche Dec. ¶¶ 7, 8 (J.A. 559); *id.* Ex. 4 ("Unfortunately our Cable no longer carries your programs, so I will no longer be sending a contribution. I shall miss them!"); Malloy Dec. ¶¶ 7, 8, 10 (J.A. 553-55); *id.* Ex. 5 ("We're sorry not to renew our participation in [Friends of Iowa Public Television], but we no longer receive the Iowa City station as part of our Cable lineup.").

shows that in fact constant dollar revenues grew slowly in the 1985-1988 period and then were essentially flat in the 1989-1992 period. *Id.* ¶¶ 5-6 (J.A. 2075-77).[44/] Discovery also points out that no public television station has gone dark. As the record indicates, this is because in the past most stations have had financial safety nets, in the form of government funding or the backing of an educational institution, and because some stations that have experienced serious financial difficulties have merged with other stations. *Id.* ¶ 9 (J.A. 2078). Moreover, cable systems were on "good behavior" during the period when must carry was not in effect. *See* pages 23-24, *supra*.[45/] The fact that no public television station has gone dark does not suggest that such stations are financially healthy or that they can avoid a very significant future threat if cable operators' conduct is no longer constrained by immediate must-carry limits.

Discovery's claim (Br., pp. 12-13) that the record fails to identify any public television station that has been in serious financial difficulty or any quantification of financial harm from cable drops disregards substantial record evidence. As non-profit entities dependent on governmental support, all public television stations face financial risk. Moreover, in fiscal year 1992 more than 16 percent of CPB-qualified public television stations had a ratio of current assets to current liabilities of less than 1:1, indicating that they were unable to meet their current obligations. Coltman Dec. ¶¶ 7-8 (J.A. 2077-78). As summarized above (*see* pages 29-33, *supra*), there is substantial evidence that cable drops

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[44/] The growth in viewership contributions during the 1980s was largely due to public television stations' adoption of more sophisticated fundraising techniques. *See* Abbott Dec. ¶ 19 (J.A. 1039). In any event, the revenue growth of public television stations was less than a quarter of the revenue growth of the cable networks that reported publicly during the 1985-1992 period. Coltman Dec. ¶ 5 (J.A. 2075-76).

[45/] The cable industry began to exercise particular self-restraint with respect to adverse actions against public television stations in 1990. *See* Brugger Dec. ¶ 32 (J.A. 1187-88) (noting that, following 1990 negotiations, NCTA worked with APTS to head off many adverse cable actions involving public television stations that came to APTS' attention).

and shifts result in lost viewer contributions, including station-specific examples of quantified financial harm.

In the court below, Time Warner attempted to belittle the public broadcasters' station-specific evidence of financial harm. For example, although the public broadcaster witnesses explained that virtually all adverse carriage actions result in some financial injury to a station, Time Warner asserted that if a station had failed to quantify its financial injury from noncarriage in a report to APTS, there was no allegation of harm. Where a station did provide quantification, Time Warner attempted to trivialize the claim by arguing, for example, that if the station had received several million dollars in gross revenue, its loss of thousands of dollars due to a cable drop was *"de minimis."* For instance, Time Warner asserted that KCSM, licensed to San Mateo Community College in California, did not suffer serious harm as a result of being dropped from a number of cable systems, despite the station's report that it lost 2,000 members and viewer contributions of $90,000 a year in connection with one group of cable drops and despite testimony that by October 1992 the station was in danger of shutting down. *See* Hosley Dec. ¶¶ 9, 12, 14 (J.A. 574-76). While such amounts may be *de minimis* to a media giant like Time Warner, they mean a great deal to the health of a non-profit public television station.[46/]

The Discovery and Time Warner allegations cannot overcome the substantial evidence showing the financial impact of adverse cable actions on public television stations. The evidence of past financial effects, accompanied by the expectation of more substantial revenue loss in the future, provides ample support for Congress' determination that a must-carry statute would help to protect the financial health of public television stations and of the public television system as a whole.

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[46/] The public broadcasters' Reply to Broadcast Station Rebuttal and paragraph 11 of the declaration of Mr. Coltman, CPB's Director of Policy Development and Planning, filed in the court below on June 30, 1995, explain further the errors in Time Warner's arguments concerning injury to individual public television stations.

### C. There Is Substantial Evidence That Must-Carry Requirements For Public Television Help Ensure The "Widespread Dissemination Of Information" From Multiple Sources.

An exclusive focus on financial effects does not adequately take into account that public television stations are nonprofit entities with different goals than commercial broadcast stations.[47/] In addition to protecting the financial health of public television stations, must-carry requirements advance the longstanding congressional goal of providing viewers with access to noncommercial educational programming.[48/]

Section 5 was enacted against the backdrop of the federal

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[47/] Congress was aware that harm to public television from the absence of must carry should be measured by criteria different from those applied to commercial entities. Henry Becton, President of WGBH (Boston), testified before the House subcommittee considering the legislation:

> We are, quite simply, different. We are public, non-profit, a national resource available to every American. There are no monthly cable charges, no three minute breaks for commercials, no effort on our part to exchange quality for quantity because of the dictates of the market. If we behave differently than our colleagues in the telecommunications industry it is because we are different. We have different goals, a different agenda, and a different definition of what we deem success.

1991 House Hearings at 841, CR VOL. I.J, EXH. 18, CR 07845.

[48/] Congress was also concerned with preserving the investment in public television already made by the public, through tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8) (findings); 138 Cong. Rec. S595, CR VOL. I.EE, EXH. 198, CR 17136 (statement of then-Senator Gore) ("This minimal regulation surely is justified to further the Government's substantial interest in making sure that all Americans have access to the quality educational and informational programming which they support through their direct contributions as well as through their state and federal tax dollars.").

government's long record of support for public television, which has the goal of providing all Americans with alternatives to commercial programming. Congress has found that public television serves an important purpose because "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."[49/] Just prior to passage of the 1992 Cable Act, Congress reaffirmed its belief that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services . . . ."[50/]

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[49/] H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801.

[50/] Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

Contrary to Discovery's characterization (Br., pp. 3, 14-15), Congress' interest in preserving universal access to public television did not lead it to require that every public television station be carried on every cable system. Congress carefully limited the must-carry requirements for public television, tailoring them to the channel capacity of the cable system and avoiding substantial duplication of programming, in order to reduce the burden on cable. *See* pages 41-43, *infra*.

Discovery is also wrong in its speculation (Br., p. 15) that Congress' invocation of the interest in widespread access to public television is related to the superior content of public television programming. Even if Congress' motivation had been content-based, Section 5 would be constitutional, because the governmental interest in promoting the public education of its citizens is compelling. *See* 1992 Cable Act § 2(a)(8)(A) (citing "the Government's compelling interest in educating its citizens"); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). *See generally* Henry Geller, *Turner Broadcasting, the First Amendment, and the New Electronic Delivery Systems*, 95 Mich. Tel. Tech. L.R. 1, 41-45 (1995); Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 Hastings Comm/Ent L.J. 65, 75-77, 83-84 (1994). However, this Court has already decided,

(continued...)

The House committee report on the 1992 Cable Act explained that must carry for public television would serve a substantial government interest by enabling the American public to continue to "have access to the programming that is available only on public television -- programming that for-profit, commercial stations either cannot or will not provide."[51/] There was evidence that some of the stations that had suffered the most adverse actions were those that were less likely to appeal to a large audience, but whose programming was critical to underserved audiences. For example, APTS found in its 1987 survey that more than half of the 74 verified drops and 128 verified channel shifts involved stations licensed to local school boards, colleges or universities, *i.e.*, those stations that tend to carry a substantial amount of instructional programming that is essential to students attempting to obtain school credit through telecourses.[52/] Examples from this and other sources include the following:

- When KCSM, San Mateo, California, a university licensee, was dropped by Viacom in San Francisco, more than half of its paying telecourse enrollees lost access to their credit

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[50/](...continued)
properly, that Section 5 is not content-based. Congress wanted to prevent situations in which cable operators were in a position to cut off viewers' access to noncommercial sources of programming, but it did not assume that that programming would have any particular content. As the Court stated in *Turner I*, 114 S. Ct. at 2461-62, "educational television" is a descriptive category that covers a wide range of content, and Congress' broad reference to noncommercial educational programming does not cast any material doubt on the content-neutral character of Section 5.

[51/] 1992 House Report at 73, CR VOL. I.A, EXH. 4, CR 00452.

[52/] Comments of APTS and PBS in MM 88-138, at 14, 23, CR VOL. I.Z, EXH. 140, CR 15298, 15307.

courses.[53]

- When WGBX, Boston, Massachusetts, was dropped by Heritage Cablevision in Massachusetts and Rhode Island, some 58,000 cable subscribers lost music series, college credit courses, and minority affairs programs not available on other area stations.[54]

- When Louisiana Public Broadcasting was dropped in Luling, Louisiana, 4,000 viewers lost access to college credit, GED, and other literacy programs.[55]

- When WNPB of Morgantown, West Virginia, had its channel shifted without advance warning by Century Cable in Morgantown, nearly 4,000 students were left without access to instructional programming. Lewis Dec. ¶ 11 (J.A. 548).

In *Turner I*, this Court recognized "widespread dissemination of information from a multiplicity of sources" to be an important content-neutral governmental interest. 114 S. Ct. at 2469. This interest encompasses Congress' concern that cable operators not be in a position to defeat the goal of widespread access to public television services. *See id.* (citing 1992 Cable Act § 2(a)(8)). As

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[53] *Id.* at 17, CR VOL. I.Z, EXH. 140, CR 15301. A cable subscriber who lost access to KCSM wrote that "my family would be lost without it. I have taken many TV courses on it and continue to do so, also my sons that are now 27 years old. They work various shifts and some semesters it is the only way they can get in a college course. It is also so very good for poor folks that find this is the only way they can further any kind of education at this time[.]" *Id.* at Att. 4, CR VOL. I.Z, EXH. 140, CR 15317.

[54] *Id.* at 18-20, CR VOL. I.Z, EXH. 140, CR 15302-04.

[55] Supplemental Comments of APTS and PBS in MM 90-4, at 15, CR VOL. I.P, EXH. 64, CR 10802.

discussed above, there is ample evidence that adverse cable actions have a significant effect on the economic health of public television stations. However, even if the financial impact were minimal, Section 5 would be a reasonable measure in view of the legitimate interest in preventing adverse cable actions that cause millions of households to lose access to unique sources of noncommercial programming.[56/]

## III. SECTION 5 IS A NARROWLY-TAILORED SOLUTION TO THE PROBLEM IDENTIFIED BY CONGRESS.

Section 5 also satisfies the "narrow tailoring" prong of the *Ward/O'Brien* standard. Section 5 is a carefully limited provision that reflects a compromise between public television and cable industry representatives. The "less restrictive alternatives" proposed by appellants would not serve the government's interests as effectively.

### A. Section 5 Is A Sensible, Limited Provision That Embodies A Compromise With The Cable Industry.

Congress found that cable operators were dropping, refusing to carry, and switching significant numbers of public television stations, preventing access by viewers and causing financial injury to the stations, and that this problem was likely to worsen in the future. It responded by adopting sensible, limited must-carry requirements that had been developed jointly by representatives of cable and public television.

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[56/] This interest does not amount to "discrimination," as Discovery suggests (Br., p. 16); instead, it reflects a legitimate desire to ensure that cable operators are not in a position to deny viewers sources of information the community is otherwise willing to support. *Turner I*, 114 S. Ct. at 2462. *See also Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."); *United States v. Midwest Video Corp.*, 406 U.S. at 669 (viewers entitled to "suitably diversified programming").

In 1990, NCTA (the leading cable trade association) and APTS (the trade association for public television stations) negotiated a proposal for must carry for public television stations. *See* Brugger Dec. ¶¶ 29-32 (J.A. 1186-88). NCTA and APTS presented their agreement to Congress, and it was quickly introduced.[57/] James Mooney, President of NCTA, described the agreement to a House subcommittee as "a workable compromise guaranteeing that public television will remain an integral part of cable's basic programming package."[58/] He stated, "[w]e are perfectly happy that there should be a reasonable must-carry rule and have already worked out a compromise with the public broadcasters on a rule covering their stations, which we have jointly recommended to the committee."[59/]

Except for the channel repositioning provision, which was added later, the provisions of Section 5 were essentially the same as those agreed to by NCTA in 1990.[60/] Since it embodies a compromise with cable, it is not surprising that Section 5 represents a carefully tailored approach. At least three different features limit the burden imposed on cable operators.

First, the number of public television stations that a cable operator must carry is limited, depending on the number of channels

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[57/] *See* 136 Cong. Rec. H6057, H6071 (March 29, 1990); 1990 House Hearings, at 150, CR VOL. I.I, EXH. 16, CR 06317 (statement of James P. Mooney).

[58/] *Id.* at 151, CR VOL. I.I, EXH. 16, CR 06318.

[59/] *Id.* at 128, CR VOL. I.I, EXH. 16, CR 06295.

[60/] The channel repositioning provision certainly does not present any First Amendment problem. As an initial matter, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. At most, the requirements are a reasonable time, place and manner restriction. Viewed (charitably) in that light, and in view of the harm that can result from repositioning (*see* pages 31, 33, 39, *supra*), the channel positioning provisions of Section 5 are clearly justified.

on the system. In general, systems with 12 or fewer channels are required to carry only one public television signal; systems with 13 to 36 channels must carry one but no more than three public television stations. Only systems with more than 36 channels must carry all public television stations that request carriage, and even this requirement is subject to certain limitations. 1992 Cable Act § 5(b)(1)-(3).

Second, Section 5 has two provisions that guard against the need to carry duplicative programming. A cable operator that carries a station affiliated with a state public television network is not required to carry the signal of another station affiliated with the same network if the programming of the additional station is substantially duplicated by that of the station already carried. *Id.* § 5(b)(3)(C). In addition, a cable operator required to carry the signals of three public television stations need not add other signals if the programming substantially duplicates that of the stations already carried. *Id.* § 5(e).[61/]

Finally, Congress sought to minimize the burden on cable operators through the "PEG" channel provision. Under the Cable Communications Policy Act of 1984, franchise authorities may reserve certain cable channels for public, educational, or governmental use. 47 U.S.C. § 531 (1988). Congress was aware that a number of these "PEG" channels were not being used.[62/] Section 5 provides that a cable operator required to add a public television station may choose to carry that station on a PEG channel if that channel is not being used for its designated purpose, subject

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[61/] In any event, the evidence before Congress showed that there was little risk of duplication. *See* 1988 House Hearings at 597, CR VOL. I.D, EXH. 9, CR 02684; 1990 House Hearings at 96, CR VOL. I.I, EXH. 16, CR 06263.

[62/] 138 Cong. Rec. H6554 (July 23, 1992) (remarks of Rep. McMillen), CR VOL. I.EE, EXH. 195, CR 17129.

to the approval of the franchising authority.[63/]

There was also evidence that the must-carry requirement for public television would impose only a minimal burden on the cable industry. Data before Congress showed that under a requirement for carriage of all substantially unduplicated public television programming:

- 84 percent of the nation's cable systems would be required to carry one public television station;
- 13 percent could be required to carry two public television stations; and
- 3 percent could be required to carry more than two public television stations, and all of those systems are located in seven large television markets: New York City, Los Angeles, Chicago, San Francisco, Boston, Washington, D.C. and New Orleans.[64/]

As Congress correctly concluded, these effects would impose very little burden on cable.[65/] In any event, the NCTA endorsement of

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[63/] 1992 Cable Act § 5(d); *see also* 1992 House Report, at 100, CR VOL. I.A, EXH. 4, CR 00481.

[64/] *Id.* at 71, CR VOL. I.A, EXH. 4, CR 00450.

[65/] *See id.* at 68, CR VOL. I.A, EXH. 4, CR 00447.

the provisions that eventually were enacted as Section 5 in itself provides a reasonable basis for Congress to have found — and for this Court to conclude — that there is no undue burden on cable.

The additional evidence submitted on remand confirms that must-carry requirements in general have had little effect on cable. *See* J.S. App. 18a-22a. For example, the evidence showed that, on a nationwide basis, only 1.2 percent of cable channel capacity is taken up by broadcast stations (both commercial and noncommercial) added as a result of must carry. *Id.* at 19a. Must-carry requirements for public television have had an especially small impact. Although Section 5 had been in effect for more than two years by that time, appellants on remand complained of only a few dozen instances in which public television stations had been added pursuant to must carry.[66/]

In view of all the circumstances, it was clearly reasonable for Congress to enact Section 5. Congress had heard substantial testimony reporting on the existence of a problem with cable carriage of public television stations, and no one stepped forward with evidence to the contrary. The two interested groups — public television and the cable industry — were united in their recommendation of legislative language that limits the burden on cable in various ways. This is more than enough to support Congress' judgment.

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[66/] Appellants argue that must carry burdens cable programmers because there is fierce competition for cable channels. They acknowledge, however, that such competition would be fierce with or without must carry. *See, e.g.*, Turner Br., pp. 42-43. In any event, public television stations occupy a very small percentage of any cable system's channel capacity, and appellants suggest that some of these stations would be carried voluntarily. *See, e.g.*, Time Warner Br., pp. 18-20.

### B. Congress Did Not Unreasonably Reject "Less Restrictive Alternatives."

Appellants argue that the must-carry provisions are unconstitutional because Congress could have enacted one or more "less restrictive alternatives." These arguments miss the mark. Under *O'Brien*, a regulation need not be the "least restrictive" means available to satisfy the "narrow tailoring" test. *See Ward v. Rock Against Racism*, 491 U.S. at 798. "[S]o long as the means chosen are not substantially broader than necessary to achieve the government's interest," the regulation will be upheld even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800; *see also Turner*, 114 S. Ct. at 2469. This Court has held in First Amendment cases that Congress has considerable discretion in choosing the method by which it furthers significant government interests. "[S]o long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," the narrow tailoring requirement is met. *United States v. Albertini*, 472 U.S. 675, 689 (1985). Moreover, the validity of a regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.*

None of the various alternatives appellants suggest would serve the government's interests as effectively as Section 5. Indeed, some of their proposed alternatives would not serve those interests at all.

*A/B Switch.* As explained in Judge Sporkin's opinion (J.S. App. 23a-24a), the cable industry itself argued before both the FCC and Congress that A/B switches were unsatisfactory in various respects. That alone provides a substantial basis for Congress' rejection of this supposed alternative to must-carry regulation. Moreover, Congress recognized that the A/B switch is a particularly unsatisfactory alternative for public television stations, most of which operate in the UHF portion of the spectrum, which is

especially vulnerable to signal interference.[67]

*The Century Rules.* *Century*-type rules are an ineffective alternative for public television stations. The so-called "Joint Industry Agreement" that preceded the *Century* rules was developed without input from public television, and the public broadcasters strongly opposed its application to public television, arguing that it provided insufficient protection.[68] Under the *Century* rules, any cable system with fewer than 54 available channels was required to carry only a single public television station; systems with 54 or more available channels were required to carry only two public television stations. 47 C.F.R. § 56(a)(1) (1987). Appellants' expert testified that fewer than 20 percent of cable systems had a channel capacity of 54 or more as of late 1994. *See* Shapiro Dec., Ex. 1, p. 8. Thus, subscribers to the great majority of cable systems would have access only to the primary public television station in a market. The second (or third) public television station — which generally focuses on telecourses, minority interest programming, or other "niche" programming — would not be available to these subscribers. In effect, both the viewers and the stations most in need of must-carry protection would lose it.

*A New Government Subsidy.* The alternative of a new government subsidy is obviously insufficient, particularly in today's fiscal climate. As an initial matter, money simply cannot replace viewer access — a fundamental congressional interest. For that reason alone, a subsidy would not be as effective as a must-carry requirement for achieving Congress' objectives. Moreover, it is most unlikely that Congress would grant additional funds to public television at a time when there is intense pressure to reduce substan-

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[67] 1992 House Report at 70-71, CR VOL. I.A, EXH. 4, CR 00449-50. *See also* Downey Dec. ¶ 20 (J.A. 1069).

[68] *See* All Parties' Joint Statement of Undisputed Facts ¶¶ 9-11; Comments of CPB, APTS, and PBS on the Joint Industry Agreement, FCC MM Docket 85-349 (Apr. 25, 1986), CR Vol. I.CC, EXH. 169, CR 16331-420.

tially and ultimately terminate the basic federal grants public broadcast stations receive. Even if Congress were willing to authorize a new subsidy, there is no guarantee that the new money would be appropriated from year to year.[69/]

*Leased Access*. As non-profit entities, public television stations are not in a position to pay substantial sums to secure cable carriage. Even if some funds were available, a cable system would not necessarily use a leased access channel to carry a public television station (as opposed to an unaffiliated cable service or a commercial station in a position to offer more money). A leased access scheme, without an assurance of carriage, would not serve Congress' interest in ensuring that viewers have access to public television services.

*"Case-by-Case" Procedures*. Finally, appellants propose antitrust proceedings or an administrative complaint procedure in place of must carry. Public television stations simply are not in a position to engage in complex antitrust litigation, which typically involves extensive discovery, years of appeals, and high legal fees. An FCC complaint procedure, while somewhat less burdensome, would also require a station to spend substantial amounts on legal fees to enforce its rights — an expense most public television stations cannot afford.[70/] Ultimately, these "case-by-case" approaches would require cumbersome and expensive procedures

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[69/] Contrary to Time Warner's contention (Br., p. 46), representatives of the public broadcasters did not agree that subsidies would be a realistic substitute for must carry (as opposed to a hypothetical remedy for financial harm resulting from lack of carriage). Indeed, they rejected the suggestion as inconsistent with reality. *See, e.g.*, Abbott Dep. (May 18, 1995), p. 170 (J.A. 511) ("given [the] current climate the odds are . . . worse than dim"). No public broadcaster witness even suggested that a subsidy could serve Congress' interest in preserving viewers' access to public television services.

[70/] Some stations faced with cable resistance to must carry have been unable to pursue even the simple FCC complaint procedure under Section 5 due to lack of resources. *See* Lewis Dec. ¶ 13 (J.A. 548-49); Beabout Dec. ¶ 11 (J.A. 526-27).

that would effectively preclude most public television stations from enforcing their rights; at best, they would delay carriage for months or years.

Appellants' related arguments that a "fit" between the government's interests and the statute is lacking and that the must-carry provisions are broader than necessary (*e.g.*, Time Warner Br., pp. 34-37) are misplaced. The cases appellants cite require only a "reasonable fit" and leave some room for the exercise of legislative judgment. *See Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *accord 44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1510, 1511 (1996). Moreover, the restrictions that were struck down for lack of "fit" in the cases appellants cite appeared to the Court to have no relation to the interests asserted by the government, to be less effective than the proposed alternatives, or to be wholly irrational in the context of the statutory scheme; in addition, the restrictions on their face were content-based. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511-16 (1993); *Rubin v. Coors Brewing*, 115 S. Ct. 1585 (1995). No such circumstances exist in this case.

In any event, contrary to appellants' claims, there is a good "fit" between the problem Congress identified and the solution it fashioned. The problem, as determined by Congress, was that public television stations were being dropped or involuntarily shifted to less desirable channels. These actions produced real harms, including financial injury to stations and denial of access by viewers. The solution provided by Section 5 is to prohibit precisely these adverse cable actions. The statute is no more extensive than circumstances require; if a cable operator voluntarily carries a station and has not repositioned it, Section 5 never comes into play. Thus, the solution is "not substantially broader than necessary" to address the problem. *Ward*, 491 U.S. at 800.

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The evidence in the record is more than sufficient to support Congress' judgment that public television stations are particularly

vulnerable to injury resulting from adverse carriage actions and that the problems identified were "real, not merely conjectural" (*Turner I*, 114 S. Ct. at 2470). Moreover, Section 5 is a sensible way to alleviate the "past harms" and "anticipated harms" (*id.*) that Congress identified, a narrowly tailored measure that imposes little burden on the cable industry. It satisfies the *Ward/O'Brien* standard and is clearly consistent with the First Amendment.

## CONCLUSION

For the reasons stated above, the three-judge court's judgment upholding the constitutionality of Section 5 should be affirmed.

Respectfully submitted,

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